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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

<p>COURT OF COMMON PLEAS ENTER <i>Beth A. Myers</i> HON. BETH A. MYERS THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.</p>
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ARTS RENTAL EQUIPMENT, INC.

Plaintiff,

v.

BEAR CREEK CONSTRUCTION,
LLC, et al.,

Defendants.

Case No. A0902785

Judge Beth A. Myers

<p>ENTERED JUN 21 2013</p>
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**DECISION/FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

The Kraft Group claimants tried this case to the Court on their claims of unjust enrichment against KTP. KTP did not defend these claims at trial. The Court finds that the Kraft Group established their claims and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Kenwood Towne Place, LLC was the owner of the mixed-use commercial project known as Kenwood Towne Place, located at 5901 E. Galbraith Road, Cincinnati, Ohio, for which construction commenced in 2007. The members of Kenwood Towne Place, LLC are: Kenwood Promenade, LLC, Bruce Baker, Thomas Zemboch, Neyer Holdings A, LLC, Nathan Bachrach, Henry W. Schneider, Schneider Family Properties, LLC, DOV II Investments, Inc. and Daniel Lipson. (Exhibit 3, Kenwood Towne Place Operating Agreement). The managing members of Kenwood Towne Place, LLC, are Matthew C. Daniels, Timothy S. Baird, Thomas L. Neyer, Jr. and Henry W. Schneider. (Exhibit 3, Kenwood Towne Place Operating Agreement; Trial Testimony of Heather Piazza, 1/24/13, Trial Trans., Pg. 89, ll 17-25; pg. 90, ll 1-25).

Bear Creek Construction, LLC was the general contractor for this project. (Piazza Testimony, 1/24/13, Trial Trans., pg. 16, ll 16-17). Audie Tarpley served as Director of Construction for Bear Creek Capital. (Deposition Testimony of Audie Tarpley, 9/16/09, pg. 14, ll 9-11).

Heather Piazza was the Assistant Development Manager for Bear Creek Capital and worked on the Kenwood Towne Place Project. (Piazza Testimony, 1/14/13, Trial Trans., Pg. 12, ll 24-25, pg. 13, ll 1-14). Steve Kelly was the owner's representative for Kenwood Towne Place, LLC. (Piazza Testimony, 1/24/13, Trial Trans., Pg. 22, ll 9-13).

Tina Schmidt was an employee of Bear Creek Capital and represented herself as Chief Financial Officer for Kenwood Towne Place, LLC. (Piazza Testimony, 1/24/13, Trial Trans., pg. 30, ll 21-23; Schmidt Testimony, 1/24/13, Trial Trans., pg. 109, ll 10-15). This was done with the knowledge of KTP.

From the outset of the project, Mr. Tarpley provided assurances that funding was in place and that there would be no problem with payment. (Jarvis Testimony, 1/23/13, Trial Trans., pg. 26, ll 15-24). Payment problems, however, began and lasted throughout the duration of the project. (Jarvis Testimony, 1/23/13, Trial Trans., pg. 27, ll 10-12). When the issue of payment was addressed with Mr. Tarpley, he continued to assure subcontractors that the funding was good and the partners were good. (Jarvis Testimony, 1/12/13, Trial Trans., pg. 30, ll 13-23). When subcontractors asked about cost overruns, Mr. Tarpley again provided assurances that there were contingencies built into the budget for the overruns. (Jarvis Testimony, 1/23/13, Trial Trans., pg. 31, ll 3-21).

According to the testimony of Audie Tarpley, during the project, there was an almost \$30,000,000.00 increase in the budget due to a number of different factors. (Tarpley Deposition,

9/16/09, pg. 42, ll 23-25; pg. 43, ll 1-2). When multiple change orders arose, Mr. Tarpley informed Matt Daniels and Tina Schmidt about the change orders and discussed funding issues. He had weekly meetings with Mr. Daniels and Ms. Schmidt and apprised them as to what was going on in the project, including change orders. (Tarpley Deposition, 1/21/11, pg. 593, ll 4-16). Daniels assured Tarpley that the project was fully funded and that if there were changes that ran over the budget, additional loans would be acquired or the partners would put in additional capital. (Tarpley Deposition, 9/16/09, pg. 41, ll 13-25, pg. 44, ll 24-25, pg. 45, ll 1-6).

Throughout the project, there were nine draw packages, including the Closing Draw, submitted by Kenwood Towne Place, LLC to Bank of America for payment. Each of the loan draw packages included the Sworn Owner's Statement which certified to the Bank that the information contained therein was true and correct. (Exhibit 1; Piazza Testimony, 1/24/13, Trial Trans. Pg. 28, ll 13-24). While working for Bear Creek, Ms. Schmidt executed and certified a series of loan draw applications as CFO for Kenwood Towne Place, LLC, which were submitted to Bank of America. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 109, ll 6-21). Each of the Sworn Owner's Statements was signed by Tina Schmidt as CFO of Kenwood Towne Place, LLC. (Exhibit 1; Piazza Testimony, 1/24/13, Trial Transp., pg. 29, ll 2-23; pg. 45, ll 3-16; pg. 50, ll 7-14; pg 58, ll 2-17; pg 62, ll 22-25; pg. 63, ll 1-2; pg. 65, ll 18-25; pg. 66, ll 1-2; 12-25; pg. 67, ll 8-18; pg 68, ll 24-25; pg. 69 ll 1-10; pg. 71, ll 25; pg. 72, ll 1-11; pg. 75, ll 12-20; Schmidt Testimony, 1/24/13, Trial Transp. Pg. 111, ll 2-15). Heather Piazza notarized Ms. Schmidt's signature for the majority of the Sworn Owner's Statements. (Piazza Testimony, 1/24/13, Trial Trans., pg. 30, ll 2-20; pg. 45, ll 8-22; pg. 58, ll 2-10; pg. 62, ll 22-25; pg. 63, ll 1-5; pg. 66, ll 1-5; pg. 69, ll 1-10; pg. 72, ll 1-11; pg. 75, ll 12-23).

The applications for payment from Bear Creek, Construction, LLC to Kenwood Towne Place, LLC, were also a part of the draw packages and contained information from subcontractors regarding sums they were owed. (Exhibit 1; Tab 2 for each Draw). The G701 portion of the payment application is a summary of the amount of the contract, less any payments that have been made and whether retainage was withheld. (Exhibit 1; Tab 2 for each Draw; Piazza Testimony, 1/24/13, Trial Trans., pg. 33, ll 4-14). Audie Tarpley signed the payment applications on behalf of Bear Creek Construction for the project. (Piazza Testimony, 1/24/13, Trial Trans., pg. 34, ll 1-7). The G703 continuation sheet, which is also a part of the payment application, shows descriptions of work, schedules of values and Change Orders. (Exhibit 1; Tab 2 for each Draw; Piazza Testimony, 1/24/13, Trial Trans., pg. 35, ll 13-25, pg. 36, ll 1).

Part of the payment application process is to impart to the owner from the general contractor that there are change orders on the project so that the subcontractors can be paid and to show the new adjusted schedule of values. (Piazza Testimony, 1/24/13, Trial Trans., pg. 81, ll 11-23; pg. 83, ll 7-19). Throughout the project, subcontractors were submitting change orders which increased the project costs. (Piazza Testimony, 1/24/13, Trial Trans., pg. 68, ll 9-17). Audie Tarpley processed the change orders and provided a copy of each of them to the owner, Kenwood Towne Place, LLC. (Tarpley Depositions, 9/16/09, pg. 104, ll 4-13).

Change Orders showing an increase in cost in multiple areas, including but not limited, to general conditions, site work, concrete and steel, were first listed early on in the project on the G703 continuation sheets in Payment Application No. 9, dated January 31, 2008. Change Orders then continued to appear on each subsequent payment application. (Exhibit 1, Draw 2, Tab 2; Piazza Testimony, 1/24/13, Trial Trans., pg 55, ll 16-25; pg. 56, ll 1-25; pg 57, ll 1-15; Exhibit

1, Draw 3, tab 2; Piazza Testimony, 1/24/13, Trial Trans., pg. 60 ll 7-20; pg. 62, ll 1-16; pg. 63, ll 16-25; pg. 64, ll 23-25; pg. 65, ll 1-8; pg. 69, ll 17-20; pg. 70, ll 21-25; pg. 71, ll 1-2; pg. 72, ll, 22-15; pg. 73, ll 25; pg. 74, ll 1-6; pg. 79, ll 3-9; pg. 80 , ll 18-25; pg. 81 ll 1) . As a result of the identification of change orders in the payment applications, Tina Schmidt was aware of the substantial cost increases on the project. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 114, ll 19-25; pg. 115, ll 1-7). As CFO of Kenwood Towne Place, LLC, Ms. Schmidt represented by way of the draw packages that improvements were being made to the project and that contractors were adding value to the project as set forth in the draw packages for which monies were due and owing. (Schmidt Testimony, 1/14/13, Trial Trans., pg. 116, ll 2-9).

Heather Piazza sent a full copy of the draw packages which had been sent to the lender to Hank Schneider, Jim Blair on behalf of Tom Neyer, Jr. and Matt Daniels. (Piazza Testimony, 1/24/13, Trial Trans., Pg. 20, ll 3-14; pg. 21, ll 12-19; pg. 25, ll 7-14; pg. 26, ll 4-14; pg. 49, ll 24-25; pg. 50, ll 1-10; pg. 62, ll 17-21; pg. 81, ll 24-25; pg. 82, ll 1-14; Schmidt Testimony, 1/24/13, Trial Trans., pg. 117, ll 7-25; pg. 118, ll 1-12).

Tina Schmidt was aware of the improvements being made on the project and the corresponding value of the improvements as she was receiving this information from Audie Tarpley and people at Bear Creek Construction (Schmidt Testimony, 1/24/13, Trial Trans., pg. 119, ll 21-24, pg. 124, ll 12-19). To date, Kenwood Towne Place, LLC has not paid Bear Creek Construction the full amount due and owing under the contract. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 118, ll 22-25, pg. 119, ll 1-14).

Ms. Schmidt was aware that Kraft Electrical Contracting Services, Inc. made improvements to the property reasonably valued at \$2,988,401.59 for which it has not been paid. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 120, ll 5-11).

Ms. Schmidt was aware that Central Insulation, Inc. made improvements to the property reasonably valued at \$435,553.60 for which it has not been paid. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 120, ll 12-19).

Ms. Schmidt was aware that Hicon, Inc. made improvements to the property reasonably valued at \$522,682.32 for which it has not been paid. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 120, ll 20-25; pg. 26, ll 1).

Ms. Schmidt was aware that LaForce, Inc. made improvements to the property reasonably valued at \$408,053.18 for which it has not been paid. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 121, ll 2-7).

Ms. Schmidt was aware that Mark Madison Company made improvements to the property reasonably valued at \$124,041.80 for which it has not been paid. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 121, ll 8-13).

Ms. Schmidt was aware that MBI Consultants, Inc. made improvements to the property reasonably valued at \$404,401.41 for which it has not been paid. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 121, ll 14-20).

Ms. Schmidt was aware that Mirage Caulking made improvements to the property reasonably valued at \$154,578.28 for which it has not been paid. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 121, ll 21-25; pg. 122, ll 1).

Ms. Schmidt was aware that Security Fence Group, Inc. made improvements to the property reasonably valued at \$76,293.46 for which it has not been paid. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 122, ll 2-7).

Ms. Schmidt was aware that Spohn Associates, Inc. made improvements to the property reasonably valued at \$162,575.00 for which it has not been paid. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 122, ll 8-12).

Ms. Schmidt was aware that Tepe Environmental Services, Ltd. made improvements to the property reasonably valued at \$89,882.00 for which it has not been paid. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 122, ll 13-18).

Ms. Schmidt was aware that Painting Contractor, LLC made improvements to the property reasonably valued at \$62,153.00 for which it has not been paid. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 122, ll 19-24).

Ms. Schmidt was aware that Triumph Signs and Consulting, Inc. made improvements to the property reasonably valued at \$350,890.29 for which it has not been paid. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 122, ll 25, pg. 123, ll 1-5).

Ms. Schmidt was aware that Universal Cleaning, LLC made improvements to the property reasonably valued at \$89,949.00 for which it has not been paid. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 123, ll 6-11).

Ms. Schmidt was aware that Kelley Brothers Roofing, Inc. made improvements to the property reasonably valued at \$281,464.05 for which it has not been paid. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 123, ll 12-17).

Ms. Schmidt was aware that Jarvis Mechanical Constructors, Inc. made improvements to the property reasonably valued at \$1,648,614.80 for which it has not been paid. (Schmidt Testimony, 1/24/13, Trial Trans., pg. 123, ll 18-24).

The knowledge of Ms. Schmidt as described above was acquired in the course and scope of her duties and actions as CFO of Kenwood Towne Place, LLC.

James J. Sigman was the accountant for the affiliated Bear Creek Group of Companies including Kenwood Towne Place, LLC and prepared tax returns and performed related accounting work for said entities. (Deposition Testimony of James J. Sigman, January 11, 2013, pg. 8, ll 23-25, pg. 9, ll 1-2, 13-21) . He was provided the information for his accounting work by both Anne Staudter and Tina Schmidt. (Sigman Deposition, January 11, 2013, pg. 10, ll 3-9). During the time period in which Mr. Sigman worked for the Bear Creek related entities, he prepared the 2008 Kenwood Towne Place Tax Return which was signed by Henry W. Schneider on behalf of Kenwood Towne Place, LLC. (Exhibit 5; Sigman Deposition, January 11, 2013, pg. 9, ll 13-21).

Mr. Garrett Sigler, is a certified public accountant with experience, both as an accountant and as a former president and co-owner of a commercial roofing contractor, relating to the billing and payment application process in the construction industry and is qualified to render an expert opinion thereon. (Exhibit 12; Trial Testimony of Garrett Sigler, 1/25/13, Trial Trans., pgs. 6-13, pg. 14, ll 1-5) . Mr. Sigler reviewed each of the payment applications and confirmed that change orders were first identified in payment application Number 9 in January of 2008 and continued through to the last payment application Number 17. There were seven line items which changed by more than one million dollars and six line items that changed by more than \$250,000.00. (Exhibit 13 – Exhibit F; Sigler Testimony, 1/25/13, Trial Trans., pgs. 17-20, pg. 21, ll 1-20). In total, there were twenty-six (26) separate contractors which had change order activity in the amount of \$14,970,000.00. (Exhibit 13 – Exhibit J; Sigler Testimony, 1/25/13, Trial Trans., pg. 21, ll 21-25; pgs. 22-23; pg. 24, ll 1-20). All of this information was contained in the payment applications which were part of the draws submitted to Bank of America. (Sigler Testimony, 1/25/13, Trial Trans., pgs. 25 ll 1-6).

CONCLUSIONS OF LAW

To establish a claim for unjust enrichment, a Claimant must establish that: (1) it conferred a benefit upon the Defendant; (2) the Defendant knew of such benefit; and (3) the Defendant retained the benefit under circumstances where it would be unjust to allow it to do so without payment to the Claimant. *Smith v. Vaughn* (1st Dist. 2007) , 174 Ohio App.3d 473, 477. See also, *Andersons, Inc. v. Consol, Inc.* (6th Cir. 2003), 348 F.3d 496, 501; *Accord Maverick Oil & Gas, Inc. v. Barberton City Schools Dist. Bd. of Edn.* (9th Dist. 2007) , 171 Ohio App.3d 605, 615; *Clapp v. Mueller Elec. Co.* (8th Dist. 2005) , 162 Ohio App.3d 810, 820; *Hollis Towing v. Greene* (2d Dist. 2003), 155 Ohio App.3d 300, 302.

The First District Court of Appeals in *Steel Quest Inc. v. City Mark Construction Services* (1st Dist. 1997), 1997 WL 674614 stated:

Unjust enrichment occurs when a party retains money or benefits that in justice and equity belong to another, *Liberty Mut. Ins. Co. v. Indus. Comm.* (1988), 40 Ohio St.3d 109-110-11, 532 N.E.2d 124, 125; *Hummel v. Hummel* (1938), 133 Ohio St. 520, 528, 14 N.E.2d 923-926-27, “As ordinarily defined, the concept of unjust enrichment includes not only loss on one side but gain on the other, with a tie of causation between them.” *Fairfield Ready Mix v. Walnut Hills Assoc., Ltd.* (1988), 60 Ohio App.3d 1, 3, 572 N.E.2d 114, 116. The defendant must knowingly retain a benefit conferred by the plaintiff under circumstances where it would be unjust to do so without payment. *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183, 465 N.E.2d 1298, 1302.

Courts in various jurisdictions have debated whether a subcontractor should be able to recover against a property owner, with whom there is no privity of contract, under a theory of unjust enrichment. Some courts have concluded that the only legal remedy available to the subcontractor is a mechanic’s lien. *Banks v. Cincinnati* (1986), 31 Ohio App.3d 54, 57, 508 N.E.2d 966, 969; Annotation (1997), 62 A.L.R.3d 288. However, this court has held that a subcontractor may pursue a claim of unjust enrichment against a property owner even if the subcontractor has failed to properly preserve its rights under a mechanic’s lien. *Banks, supra.* At 57, 508 N.E.2d at 969. However, we have also held that if the owner has paid the general contractor in full for all performance rendered at the construction site, the owner has not received a benefit for which it

has not paid. Consequently, the owner has not been unjustly enriched. (some citations omitted).

The Court held that because the undisputed evidence established that the owner paid the general contractor everything owed under the contract, the owner received no benefit to which it was not entitled.

In this case, KTP did not pay Bear Creek in full for the work and therefore the Kraft Group may recover on their claims for unjust enrichment. The Court finds that the Kraft Group members have established their claims.

Defendant, Tina Schmidt, prior to and during her trial testimony, exercised her Fifth Amendment right against self-incrimination. In accordance with Ohio law, the Court will draw a negative inference against Ms. Schmidt in favor of the Kraft Group where she refused to answer questions by asserting her Fifth Amendment right. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *Baxter v. Palmigiano*, 425 U.S. 308, 317-318 (1976) (quoting 8 J. Wigmore, *Evidence* 439 (McNaughton rev. 1961); *State ex rel. Verhovec v. Mascio*, (1998), 81 Ohio St.3d 334, 337, 691 N.E.2d 282, 284.

According to the testimony of Tina Schmidt, Kraft Electrical Contracting, Inc., Hicon, Inc., Central Insulation Systems, Inc. LaForce, Inc., MJB Consultants, Inc., The Mark Madison Company, Tepe Environmental Services, Ltd., Mirage Caulking, Inc., Universal Cleaning, LLC dba Universal Cleaning, Security Fence Group, Inc., The Painting Contractor, LLC, Triumph Signs and Consulting, Inc., Spohn Associates, Inc., Kelley Bros. Roofing, Inc. and Jarvis Mechanical Constructors, Inc. each made improvements to the property owned by Kenwood Towne Place, LLC in a specific amount for which each has not been paid, thereby conferring a benefit upon Kenwood Towne Place, LLC.

The evidence demonstrates that Kenwood Towne Place was aware of, understood and agreed to the change orders for this project. According to the un-refuted testimony of Heather Piazza, Audie Tarpley, Tina Schmidt and Garrett E. Sigler, Kenwood Towne Place, LLC, had knowledge of the benefit which was being conferred by each of the members of the Kraft Group.

Tina Schmidt, as CFO of Kenwood Towne Place, LLC, certified the Sworn Owner's Statements containing the information related to the work performed by the subcontractors on the project and the change orders which were being issued. The knowledge of Ms. Schmidt was acquired in the course and scope of her duties and actions as CFO of Kenwood Towne Place, and that knowledge is imputed to Kenwood Towne Place, LLC.

Hank Schneider, Tom Neyer and Matt Daniels, managing members, each received copies of the draw packages which were being sent to the Bank for payment which included change orders which began in January of 2008 thereby demonstrating the increasing costs on the project. *Audie Tarpley shared the information regarding multiple change orders and the fact that the budget had increased by almost \$30,000,000.00 with Matt Daniels and Tina Schmidt.* Mr. Daniels and Ms. Schmidt continued to assure Mr. Tarpley that the project was fully funded and that if there were changes that ran over budget, they would either get additional loans or the partners would put in additional capital.

The 2008 U.S. Income Tax Return for Kenwood Towne Place, LLC, (information for which was provided by Tina Schmidt, CFO, of Kenwood Towne Place, LLC and signed by managing member, Henry W. Schneider), identified an account payable owed by Kenwood Towne Place, LLC to Bear Creek Construction totaling \$4,833,742.47. The evidence established that Kenwood Towne Place, LLC has not fully paid Bear Creek Construction for the work performed by its subcontractors.

The Kraft Group members made improvements to the Kenwood Towne Place, LLC property with knowledge of the members of Kenwood Towne Place, LLC. Kenwood Towne Place, LLC has wrongfully retained the benefit conferred to the detriment of the members of The Kraft Group. It would be unjust for Kenwood Towne Place, LLC to retain the benefits of the improvements without payment.

Therefore, the Kraft Group members are each entitled to recover from Kenwood Towne Place, LLC, the reasonable value of the materials supplied and services performed in the following amounts:

<u>PARTY</u>	<u>COMPENSATORY</u>	<u>INTEREST</u>
Kraft Electrical Contracting Services, Inc.	\$2,988,401.59	\$474,541.75
Central Insulation, Inc.	\$433,553.60	\$67,525.75
Hicon, Inc.	\$522,682.32	\$83,142.17
LaForce, Inc.	\$408,053.18	Per contract rate of 1.5% per month: \$369,497.09
		Statutory rate: \$62,170.14
Mark Madison Company	\$124,041.80	\$18,999.88
MBJ Consultants, Inc.	\$404,401.41	\$62,846.44
Mirage Caulking, Inc.	\$154,578.28	\$27,668.45
Security Fence, Inc.	\$ 76,293.46	\$11,957.82
Spohn Associates, Inc.	\$162,575.00	\$23,477.46
Tepe Environmental Services, Inc.	\$ 89,882.00	\$14,087.22
The Painting Contractor, LLC	\$ 62,153.00	\$ 9,706.43
Triumph Signs & Consulting, Inc.	\$350,890.92	\$55,672.46
Universal Cleaning, LLC	\$ 89,949.00	\$13,925.48
Kelley Brothers Roofing, Inc.	\$281,464.35	\$44,696.10
Jarvis Mechanical Constructors, Inc.	\$1,648,614.80	\$261,249.55

The Kraft Group members are referred to Local Rule 17 for preparation of an Entry.


Judge Beth A. Myers

Copies to:

All Counsel of Record

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JUN 21 2013

HON BETH A. MYERS